No. 80998-4

THE SUPREME COURT
OF THE STATE OF WASHINGTON

BURT, et al.,

Plaintiffs/Respondents;

v.

WASHINGTON DEPARTMENT OF CORRECTIONS,

Defendant/Respondent.

PETITIONER'S RESPONSE TO AMICI BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION

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A. INTRODUCTION

Amicus curiae American Civil Liberties Union ("ACLU") filed a brief with this Court on December 19, 2008. Petitioner Parmelee hereby files this response arguing that the ACLU's position that a requester is not an indispensable party should not be heeded.

B. SUMMARY OF THE ARGUMENT

The ACLU suggests this Court adopt a notice requirement to permit the records requester to choose whether or not to participate in litigation based upon their request per the Public Records Act ("PRA"). They suggest that this notice requirement would be met by requiring the agency to

> provide the requester with a copy of the Complaint along with known hearing dates and information regarding how the requester may participate in the PRA injunction action if they choose to do so.

Brief of ACLU at 4. Amicus ACLU further takes the position that making the requester an indispensable party under CR 19 "would have a chilling effect on the public's right to access." *Id.* at 3.

Mr. Parmelee will show that while the ACLU has acted with the best of intentions, if this Court follows their suggestions, it will result in the worst of results. "The road to hell is paved with good intentions."[1]

First, Mr. Parmelee will show that such a procedure suggested by the ACLU's brief puts even more of a litigation barrier on the requester. He will then show that such a procedure raises jurisdictional questions about the lawsuit. He finally will show that this proposed process does not acknowledge the realities of three party injunctions on an agency's responsibilities.

C. ARGUMENT

1. Not Requiring A Requester Be Made An Indispensable Party Raises Barriers To Litigation.

Providing a requester the notice necessary to participate does not provide that party the means to participate. Under CR 24, the requester must ask the court's permission. This requires a motion and other accouterments of the litigation art – one a requester may not be aware of. This could easily result in intimidating the requester's participation if the

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[1]While this proverb is often attributed to Samuel Johnson, it apparently is much older and is at least traced back to 1574. Its roots possibly come from Saint Bernard of Clairvaux (c. 1150) who stated "L'enfer est plein de bonnes volontés ou désirs." ("Hell is full of good intentions or desires.") In 1670, John Ray cited the variation: "Hell is paved with good intentions." Titelman, Gregory; Random House Dictionary of America's popular Proverbs and Sayings, 2nd Ed. New York, New York (2002)

requester lacks familiarity with the legal system. While there is an intimidation factor in requiring joinder of the requester, only one of these scenarios has the effect of rasing a barrier to litigation – the one suggested by the ACLU. Our courts have consistently recognized the interest our citizens have in monitoring their government. Putting any barriers to obtain records goes against this interest.

2. Depending On Notice Being Provided By The Agency Ignores Problems With The Process.

The method suggested by the ACLU, intervention, raises further problems downstream. First, if an agency fails to properly inform the requester of the pending action, either through its own actions or the actions of the post office, the result is a ruling in which the requester does not have a chance to participate. Furthermore, the trial court would have no knowledge of whether or not the request had been withdrawn by the requester's inaction. Only making the requester avoids this problem by requiring personal service and proof thereof.

Ostensibly, the agency and the "subject-party" could litigate the case even after the request had been withdrawn.[2] Furthermore, neither party is forced, without litigation, from providing the requester a copy.

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[2]For the sake of convenience, Petitioner adopts the language used by the ACLU to describe the "individual who is named" or "whom the record specifically pertains" to. RCW 42.56.540.

RCW 42.56.550. If an agency responds to an absent requester by providing a copy of the final injunction, the requester is forced to come back to the trial court with a CR 60 motion, arguing they were not provided proper notice. This surely takes specialized knowledge. This then strikes at the heart of a court's constant conundrum – when to assert finality.[3] It makes no sense, from an administrative prospective, to not require the requester be made a party ensuring that all interested parties are before the court when an injunction action is decided.

3. The ACLU's Concern About a Chilling Effect Requesters is Misplaced.

The ACLU argues that requiring the requester to be joined as a party would chill requests because requesters would face the threat of litigation. Brief of ACLU at 16. This argument misses the mark completely. Requesters currently face the threat of litigation every time a public records is made, either by the agency or a "person who is named in the record or to whom the record specifically pertains. . . ." RCW 42.56.540. There is no significantly greater risk of litigation to a requester

[3]As this Court is quite aware, finality in the judicial system is an important element in controlling the administrative work load. Hence, limitations are placed on motions for reconsideration and for new trials in accordance with CR 59 and 60. This is also the policy reason collateral estoppel exists to prevent relitigation. *State v. Harrison*; 148 Wn.2d 550, 561, 61 P.3d 1104 (2002).

with a requirement that a third-party who seeks an injunction must include the requester in the action.

This interpretation comports with this Court's prior ruling in *Soter v. Cowles Pub. Co.*, 162 Wn.2d 716, 753, fn 16, 174 P.3d 60 (2007). While *Soter* dealt specifically with a injunction action brought by an agency against a requester, the basic situation exists even if the injunction is brought by the subject-party.

The ACLU tried to distinguish this Court's ruling in *Soter*, claiming there is a statutory difference between when an agency or a subject-party files an injunction. Brief of ACLU at 17-18. But this argument ignores the plain language of RCW 42.56.540. The statute must be read disjunctively because both the agency and the subject-party are separated by the "or." "Or" is presumed to be used disjunctively in a statute unless there is clear legislative intent to the contrary." *State v. Bolar*, 129 Wn.2d 361, 365-66, 917 P.2d 125 (1996) (citations omitted.) It certainly makes no difference to the requester if either party names her in their suit – the requester is still a party and has a limited range of choices – including those mentioned in *Soter*. This Court's reasoning in *Soter* agrees with all these points. *Soter*, 162 Wn.2d at 753 n.16.

In trying to distinguish, based solely on potential penalties, the ACLU's discussion of safeguards draws a distinction without a difference.

Brief of ACLU at 18. While it is true that only an agency risks incurring daily penalties, it is not clear why that affects the position of the requester. The requester's interest in the request is the same no matter who is seeking to prevent disclosure. If there are problems with supporting the interests of the requester against the subject-party because of the lack of penalties, it is a chore the legislature must tackle, not the courts. *Soter*, 162 Wn.2d at 753 n.16.[4]

4. An agency Can Not Represent the Public Interest in a Public Records Act Action.

The ACLU concedes that the requester has an interest in litigation concerning her records request. Brief of ACLU at 11.[5] What the ACLU fails to note is that the requester is often the *only* party, besides the party seeking injunction, interested in her request. When an agency brings an injunction action, an agency has decided that an exemption applies and the agency expresses its interest in preserving the public policy recognized by

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[4]This Court's prior decision has held that when an agency is willing to disclose the records and it is the individual who bring an action to prevent disclosure, and the *agency does not actively oppose the requester*, penalties are not applicable. (Emphasis added). *See Confederated Tribes v. Johnson*, 135 Wn.2d 734, 958 P.2d 260 (1998). If changes there must be, legislative action must occur.

[5]Notably, Respondent Department of Corrections also concedes that a requester likely has an interest in any litigation brought over a request. Resp. Supp. Brief at 12 fn 4.

the exemption. However, when a third party seeks an injunction, the agency has no real interest in the litigation.[6] *See Confederated Tribes*, 135 Wn.2d at 742-43 (acknowledging agency's disinterest by denying attorney fees in requester's success in third party injunction action). This Court has recognized that the PRA does not allow a court to trust an agency to advocate for the public interest in disclosure. *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 135, 580 P.2d 246 (1978).

Genuine adversity exists in a lawsuit only when the party seeking one outcome (injunction) is paired against a party seeking the opposite outcome (disclosure in the public interest).[7] An agency is never in the position to argue to a court in favor of disclosure. *Id.* Therefore, the only way to ensure true adversity is a requirement that no injunction action dealing with a specific record can proceed without a requester who has sought that specific record.

The PRA's greatest concern is ensuring that the public has access to public records. The requester is in the best position to argue vigorously for disclosure of a specific record. The public interest is disserved without

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[6]In this case, the Department of Corrections actively supported the actions of its employees.

[7]The lack of genuine controversy may deprive the court of a justiciable controversy. *See Nelson v. Appleway Chevrolet, Inc.*; 160 Wn.2d 173, 186, 157 P.3d 847 (2008).

the participation of the requester. A ruling recognizing that the requester has an interest in the outcome of any injunction action, and that the outcome of an injunction action could prejudice the requester's interest, would support a conclusion that a requester is a necessary and indispensable party in any action in which *any* party seeks to enjoin the fulfillment of the requester's request.

D. CONCLUSION

For the reasons set forth above, appellant Allan Parmelee respectfully asks this Court to reject the reasoning presented by Amicus Curiae ACLU.

DATED this 9th day of January, 2009.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify under the penalty of perjury under the laws of the State of Washington that on January 9, 2009, in Seattle, County of King, State of Washington, that I deposited the following document(s) with the United States Mail, postage prepaid and 1st class on the following parties:

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